

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-7017

To be argued by
MORRIS CIZNER
OR
MARTIN LASSOFF

United States Court of Appeals
FOR THE SECOND CIRCUIT

PETER RUFFINO,

Plaintiff-Appellant,

—against—

SCINDIA STEAM NAVIGATION CO., LTD.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PLAINTIFF-APPELLANT'S REPLY BRIEF

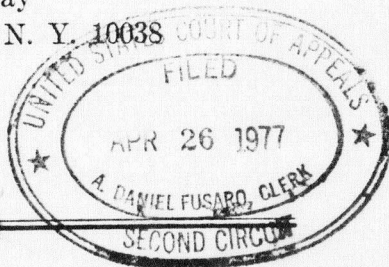
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POINT I

Shipowner had constructive notice of the dangerous condition and is liable for negligently furnishing plaintiff with an unsafe place to work.

Basically, shipowner has the duty to exercise reasonable care to furnish the longshoremen with a reasonably safe place to work.

In Point I of their Brief, defendant shipowner sets forth an incorrect statement of the law which represents at best confused thinking. It is their position that the 1972 Amendment "laid to rest the old doctrine of a duty on the part of the shipowner to provide a longshoreman with a safe place to work". This is simply not correct. Their

quotes from the Congressional Committee Reports left out the following:

"Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work.

"Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition".

In *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505 (2 CA 1976) the court stated that shipowner "was required, therefore, to exercise reasonable care under the circumstances to furnish plaintiff with a reasonably safe place to work".

Thus, if there is a dangerous condition on board ship and shipowner knew or should have known of same, they have a duty to warn and to take corrective action.

The question then becomes—did shipowner know or should they have known of the dangerous condition, and, in that connection, the question is also did they create the condition by participating in the stowage and the direction given to stevedore laborers. The ship's officers were not only in a position to see the condition of the stow but participated in the creation of the condition.

The record is replete with testimony of the unusual nature of the cargo requiring special care because of the cargo of rugs being placed on top of palletized tea. The ship's officers were constantly inspecting and looking, directing and correcting the stevedore laborers.

Actually, when the chief mate sought to testify on direct as to how the cargo of tea was placed in the hatch, objection was made unless he saw how it was stowed. He was then asked questions by shipowner's counsel to qualify him and it was then that he testified that he was down in the hatch looking at the cargo and he made the stowage plan and told the longshoremen where and in what space the different cargo was to be put. He had to be there before the rugs covered the tea to properly prepare the final stow plan. Thus, not only did they see the cargo, its spacing, its lay-out and how stowed, but actually caused it to be stowed in the condition complained of. It should also be remembered that shipowner was supposed to supply the dunnage and plywood—and the palletized tea by its very nature necessarily had holes when stowed even tightly together. Here there are too few pallets of tea to cover the area to be used for the stowage of the rugs. The nature of the rugs was such that you couldn't pile them too high and it became imperative to cover the spaces in the stow of tea—which the jury found they did not do.

Furthermore, because of such spaces the cargo shifted in transit since none were braced. They admitted that cargo should have been so stowed as not to shift or be disturbed by the weather conditions and seas to be encountered. This they did not do. When the ship came to New York the stow was disturbed,—the rugs appeared unstowed and some were on the floor of the deck and some in spaces between pallets of tea.

Shipowner was required to make inspection to see that the vessel was reasonably fit for use by the longshoremen in New York and also was a reasonably safe place to work.

If they had looked, it would have been obvious to them that the stow was distributed and cargo had shifted and furthermore it would have been obvious to them that there was no bracing of cargo and there was no dunnage or plywood flooring beneath the rugs to keep them from falling into the spaces between pallets of tea and on to the floor. The condition of the stow on arrival in New York should have acted as a warning to them and given them reason to suspect that the dangerous condition complained of existed. Having ship's officers suspect a dangerous condition existing, they should have made further inquiry or investigated further and done something about it. They made no further inquiry and they did nothing about correcting the condition. This charges shipowner with constructive notice of the defective condition.

The fact is that the ship's crew themselves created or participated in the creation of the dangerous condition; they had, at least, constructive notice at the time of loading and surely constructive notice of a defective condition at the time the ship arrived in New York. It should be remembered that this is *not* a condition created or participated in by plaintiff's employer. This was a latent condition, a trap as far as plaintiff was concerned. The jury understood it as such.

The cases cited by shipowner have in the main been referred to in plaintiff's original brief. These cases generally pertain to operational negligence by stevedore whose employee is injured thereby. Also some cases involve a minute detail of the work. Suffice it to say that in our case it did not require a minute continuous supervision of every detail of the work to ascertain that the flooring was missing in its entirety on a stow which ran

from the skin of the ship in one wing across the wing, the square of the hatch and into the other wing. This was not a missing detail but a general condition.

Defendant seems to rely on the Fifth Circuit case of *Gay v. Ocean Transport & Trading, Ltd.* (5th Cir. Docket Nos. 75-2729-75-2441). That case actually cites *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505 with approval and states that the Fifth Circuit will follow the Second Circuit in its modern view and in its application of the Restatement (Second) of Torts.

The fact situation in the *Gay* case is entirely different from that which is on appeal here. There are two cases decided in *Gay*—in one, defective equipment was involved with the parties stipulating that shipowner had no notice of the defective and dangerous condition. In the other case there was a specific finding that the accident occurred by reason of the negligence of the stevedore in the handling of the winch which dislodged a pallet causing it to fall into a hatch. Both involved operational negligence which is not involved here.

Shipowner's reference to *Bess v. Agromar Lines* on page 13 of their brief is inaccurate. The basis of the Court's decision there was that the crew was not on board and the accident occurred during the loading process which was under the sole control of an expert independent stevedore. (The word *sole* was left out by defendant thereby changing the meaning of the holding).

With respect to the failure to provide dunnage the Court there stated that there was no testimony that the shipowner was supposed to supply dunnage, but if they were supposed to do so, and there was such testimony, shipowner would have been held liable.

POINT II

The Restatement (Second) of Torts is applicable to this case and shipowner is liable to plaintiff thereunder.

The defendant shipowner does admit that the Restatement (Second) of Torts is relevant in determining the standard of care owed by shipowner but claims that Section 343 alone is simplistic.

Shipowner points to Section 409 of the Restatement as being "particularly relevant to the case at bar", and then sets forth an alleged quote of this section found on page 13 of their brief.

Plaintiff agrees that the Restatement is relevant to the determining of the care and duty imposed on shipowner. Plaintiff does not, however, agree to a misquote or a partial quote which changes the meanings of the sections. The first words of Section 409 "Except as stated in Sections 410-429" were omitted from the quote in shipowner's brief and such omission materially alters the meaning of Section 409.

In comment (b) under this Section, the Restatement states:

" . . . the law has progressed by the recognition of a large number of 'exceptions' to the 'general rule.' These exceptions are stated in §§ 410-429. They are so numerous, and they have so far eroded the 'general rule,' that it can now be said to be 'general' only in the sense that it is applied where no good reason is found for departing from it."

Under Section 410 shipowner is liable for the act or omission committed by stevedore pursuant to orders or directions negligently given by the shipowner.

In our case the palletized tea was placed and spaced in an excessively large area to support and permit the proper stowage of the rugs on top thereof. The resulting spaces in the stow necessitated plywood or dunnage covering same and bracing of the tea to prevent shifting. The placing and spacing of the cargo in the area was pursuant to and necessitated by the instructions of the Chief Mate.

No instructions, however, were given to the longshoremen to place plywood on the tea.

Under Section 411 shipowner was required to exercise reasonable care to employ "competent and careful contractors". Comment (a) thereunder explains the meaning of the quoted words to be one who possesses the knowledge, skill, experience and available equipment that a contractor must have to do the work without creating unreasonable risk of injury to others. He must be competent and careful. There is no proof in the record that the stevedore was competent and careful nor is there any such presumption. There is no testimony as to the stevedore's knowledge, skill or experience. We do not even have his name. The defendant has failed in its proof and now claims in its brief that the loading longshoremen were employed by an "expert independent contractor" citing page 200 (a) of the appendix. Shipowner calling him an expert in its brief doesn't make him an expert.

In any event, even if it were true, that does not satisfy the definition and requirement of Section 411. Page 200 (a) refers to those who loaded the cargo as "stevedore laborers" and nothing more. From the failure to have dun-

nage or plywood covering the tea; the failure to brace the cargo; the dangerous condition of the cargo at the end of the voyage—all as must have been found by the jury, there is a strong inference that the stevedores were not competent and not careful.

The extent of participation, direction and control that shipowner found necessary in connection with the loading operations indicates quite clearly that shipowner did not and felt they could not entrust the work to these stevedores.

Section 412 is described in the Restatement under Topic 1, Harm Caused by Fault of Employers of Independent Contractors. The employee of a contractor is liable in failing "to exercise reasonable care in inspecting the work after it is done or, in certain cases, during its progress, in order to see that the work is so done as to secure the safety of others".

It should be noted that in comment (f) and (g) found after section 422 there is an explanation of "inspection". Although inspection, after the work was completed, is required, the Restatement recognizes that at times bad workmanship at an early stage of the work is concealed by subsequent progress of the work. Inspection after the work is completed would obviously not reveal the dangerous character of the work. Shipowner is "under a duty not merely to inspect the work when it is finished but to make such inspections during its progress as a reasonable man would realize to be necessary to ascertain whether it is being so done as to make the building or other condition reasonably safe. This duty, if it exists, cannot be delegated so as to escape responsibility for its inadequate performance".

Thus there was a duty on shipowner's part to inspect the stow during the progress of the loading operations to see

that the necessary flooring was laid. That was not burdensome since they were in, at and about the hatch in any event and by their own testimony it was absolutely necessary to have a plywood or dunnage floor on top of the cargo of tea before stowing the cargo of rugs atop same.

Section 413 is described under said Topic 1 of Harm Caused by Fault of Employers of Independent Contractors as imposing liability for failure "to exercise reasonable care to provide for the taking of such precautions, either by the contractor whom he employs or otherwise, as in advance are recognizable as necessary to enable the work to be safely done".

Section 414 of the Restatement pertains to the retention of control by shipowner of any part of the work performed. He is held liable under this section for failure to exercise his control with reasonable care.

Under comment (a) the degree of control need not be complete so as to make shipowner a master. "He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself and others—he may be liable under the rule stated in this section unless he exercises his supervisory control with reasonable care so as to prevent the work he has ordered to be done from causing injury to others."

Under comment (c), to find that this section applies, it is not required that stevedore is controlled by shipowner "as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way."

Obviously, Section 414 is applicable to our case in view of the facts testified to.

Section 422 imposes liability on a shipowner for physical harm to others caused by unsafe conditions caused or created by work performed by the stevedore. The physical harm occurs after the possessor (shipowner) resumes possession of the ship upon the completion of the work.

Thus, shipowner had at least constructive notice of the dangerous and defective stow by reason of

(1) their presence in and at the hatch and participation in the stowage as testified to, quoted in plaintiff's brief on appeal herein;

(2) by their direction, they created a condition of too much space between the pallets of tea necessitating not only special treatment of the stow but predisposing same to shifting on the voyage, and particularly in rough seas, which they should have anticipated;

(3) shipowner having a duty to inspect under the Restatement (Second) of Torts during the loading operations to see that the cargo was braced and necessary flooring laid;

(4) shipowner, in the exercise of reasonable care and knowing that longshoremen would have to discharge the cargo and climb on top of same, and knowing that a floor was imperative for the safety of the men and the cargo, should have looked to see that a potentially hazardous condition was not created by failure to take the special care necessary under the circumstances;

(5) the disturbed condition of the stow upon opening of the hatch in New York. The fact that the rugs appeared thrown in and not stowed and were in part between pallets

and in spaces on the flooring should have given ship's officers reason to suspect that there were holes in the stow and/or the cargo had shifted leaving holes in the stow and/or no flooring was laid on the tea and hence, in any event, there were open spaces in the stow.

Having reason to suspect the existence of such dangerous condition and making no further inquiry or doing nothing about it charges shipowners with constructive knowledge or notice of the defective condition. (Parenthetically, this is the red herring alluded to in defendant's brief probably because they had no other answer to the charge made.)

POINT III

The quoted testimony conclusively proves that shipowner directed and participated in the stowage operations.

The quoted testimony in plaintiff's brief are neither distortions or out of context. They set forth answers given by the chief mate both on direct and cross examination. The large number of answers given showing participation and direction by shipowner in this stowage operation are apparently an embarrassment, contradicting that which they urged the Trial Judge to accept as the testimony.

Obviously, the jury determined the questions of fact based on this quoted testimony and there is no reason, legal or moral to set aside this jury verdict.

CONCLUSION

The jury verdict and judgment in plaintiff's favor should be reinstated.

Respectfully submitted,

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two (2)
Service of ~~three~~ (3) copies of the within Reply Brief
is admitted this 26th day of April 1977

Haight, Gardner, Poor + Havens
Deputy - Amicus